LIBRARY

No. 706

Office-Supreme Court, U.S.
FILED
JAN 25 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

BEN WEST, et al.,	Appellants,	No. 37,670. On Appeal from the Supreme Court of the State of Tennessee.
vs.		
JOE C. CARR, et al.,	Appellees.	

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF.

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee.

THOMAS E. FOX,
Assistant Attorney General,
State of Tennessee.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

Page

Statement of the case 2

Adequate non-Federal ground 4

No substantial Federal question 7

Appellant without standing in this court 10

Cases Cited.

Aero Mayflower Co. v. Board of Railroad Commissioners, 332 U. S. 495, 499-500, 68 S. Ct. 167, 169-170, 92 L. Ed. 99, 105 6

Albertson v. Millard, 345 U. S. 242, 244, 73 S. Ct. 600, 602, 97 L. Ed. 983, 985 6

Black v. Cutter Laboratories, 351 U. S. 292, 298, 76 S. Ct. 824, 827, 100 L. Ed. 1188, 1197 4

Cramp v. Board of Pub. Inst. of Orange Co., Fla., 368 U. S. 278, 285, 82 S. Ct. 275, 279-280, 7 L. Ed. (2d) 285, 291 ..... 6, 10

Cummings v. Beeler, 189 Tenn. 151, 175-176, 223 S. W. 2d 913, 923 ..... 2, 8

Flournoy v. Wiener, 321 U. S. 253, 262, 64 S. Ct. 548, 553, 88 L. Ed. 708, 715 4

Fox Film Corp. v. Muller, 296 U. S. 207, 210, 56 S. Ct. 183, 184, 80 L. Ed. 158, 159 4

Garner v. Louisiana, 368 U. S. 157, 166, 169, 82 S. Ct. 248, 253-254, 7 L. Ed. (2) 207, 216 6

Herb v. Pitcairn, 324 U. S. 117, 125-126, 65 S. Ct. 459,

Kingsley Int. Pic. Corp. v. Regents of N. Y. U., 360 U. S. 684, 688, 79 S. Ct. 1362, 1365, 3 L. Ed. (2d) 1512, 1516 6

Louisville & N. Railroad Co. v. Woodford, 234 U. S. 46, 34 S. Ct. 739, 58 L. Ed. 1202 4

Statutes Cited.

Public Acts of 1962, Chapter 2 ..... 2, 3, 4, 5, 7, 8, 9

Tennessee Code Annotated:

Secs. 23-1101-1113 ..... 2, 3, 4, 5

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

BEN WEST, et al.,	Appellants,	No. 37,670. On Appeal from the Supreme Court of the State of Tennessee.
vs.		
JOE C. CARR, et al.,	Appellees.	

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

Appellees move to dismiss the appeal to this Court on the following grounds:

(a) Judgment rests on an adequate non-federal basis;

(b) There is not presented a substantial federal question; and

(c) Appellant has no standing in this Court to challenge the state statute involved.

Consideration of the motion requires a statement of the case as follows:

STATEMENT OF THE CASE.

This suit was brought by Ben West as Mayor of the City of Nashville and as a voter and taxpayer of Davidson County, Tennessee, under the Tennessee Declaratory Judgments Act (Tennessee Code Annotated, Sections 23-1101 to 1113) seeking a decree enjoining the holding of a referendum election in November, 1962, which statewide election was to be held under the principle of one person, one vote, to determine whether the voters favored the holding of a Constitutional Convention, and also seeking a judgment declaring that said statute is unconstitutional.

The challenged Act, being Chapter 2 of the Public Acts of 1962, was passed on June 7, 1962. It is an Act submitting to a vote of the people of Tennessee, in one of the modes prescribed by the Constitution of Tennessee, proposals to alter, reform or abolish certain parts[1] of said Constitution.

The Act provides that at the General Election to be held on Tuesday after the first Monday in November, 1962, there shall be submitted to the people of Tennessee, voting at large, the question of holding a Constitutional Convention limited to consideration of proposals to alter, reform or abolish specified sections of the State Constitution.

It further provides that if a majority of the votes cast in that election (November 6, 1962) shall be in favor of the convention, delegates to such convention shall be elected by the people in the general election in August, 1964, "in the several counties and floterial districts and each such county and floterial district shall elect one dele-

[1] In Tennessee the Legislature may submit to popular referendum the matter of holding a constitutional convention with power to propose amendments to the State Constitution, restricted to specified sections or provisions of the State Constitution. Cummings v. Beeler, 189 Tenn. 151, 223 S. W. (2d) 913.

gate for each representative to which it is entitled in the House of Representatives of the General Assembly, at the time of the passage of this Act."

It also provides that the delegates so chosen in the election in August, 1964, shall meet in convention in Nashville on the last Monday in July, 1965; that such convention shall be limited to the matters aforesaid; and that any proposal the convention may adopt as to any of such matters "shall be separately submitted to the voters of the State for ratification or rejection" in an election on a date to be fixed by the convention; and that only such proposal or proposals as shall be so ratified shall become part of the Constitution.

The effort to enjoin the holding of an election at which the voters would express their wishes as to a constitutional convention failed, the courts below deciding that in line with prior decisions a court in Tennessee has no power to enjoin the holding of an election except under unusual circumstances not present in this case. The election was held and a majority of the voters of Tennessee voted in favor of holding the proposed constitutional convention. Such was the result in a statewide election held under the principle of one person, one vote, and with every qualified voter of Tennessee entitled to vote.

The trial court (Chancery Court of Davidson County, Tennessee), while refusing to enjoin the holding of the referendum election in 1962, expressed the opinion that said Chapter 2, Acts of 1962, was unconstitutional.

On appeal, the Supreme Court of Tennessee reversed and dismissed the suit, holding that Appellant's Bill of Complaint failed to state a cause of action under the Tennessee Declaratory Judgments Act. The Tennessee Supreme Court in its Opinion on Petition to Rehear, also said that Appellant's Bill of Complaint "failed to show an invasion of any right of his, federal or state."

ADEQUATE NON-FEDERAL GROUND.

The Supreme Court of the United States from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.

Louisville & N. Railroad Co. v. Woodford, 234 U. S. 46, 34 S. Ct. 739, 58 L. Ed. 1202;

Fox Film Corp. v. Muller, 296 U. S. 207, 210, 56 S. Ct. 183, 184, 80 L. Ed. 158, 159;

Flournoy v. Wiener, 321 U. S. 253, 262, 64 S. Ct. 548, 553, 88 L. Ed. 708, 715;

Herb v. Pitcairn, 324 U. S. 117, 125-126, 65 S. Ct. 459, 464, 89 L. Ed. 789, 794;

Black v. Cutter Laboratories, 351 U. S. 292, 298, 76 S. Ct. 824, 827, 100 L. Ed. 1188, 1197.

The stated principle is applicable and decisive here because the judgment on appeal rests on an adequate state ground, to wit: the interpretation by the Tennessee Supreme Court of the Tennessee Declaratory Judgments Act.

The statute here challenged, Chapter 2 of the Public Acts of Tennessee of 1962, provides for a constitutional convention to be held if the voters in a statewide referendum election approve the holding of the same. The statute also provides for the delegates who shall compose the convention.[2] The statute further provides that the constitutional convention when assembled may recommend to the voters for acceptance or rejection amendments to specific provisions of the Tennessee Constitution, and if the voters approve the proposed amendments, they will become part of the State Constitution.

---

[2] As hereinafter discussed, it is the provision with respect to delegates composing the constitutional convention which appellant claims to render the Act unconstitutional.

The proceeding on appeal here in the present case was instituted **before** the voters had voted in the referendum election in favor of the convention, **before** the delegates to the convention were to be chosen, **before** the members of the convention had submitted to the electorate any proposed amendments to the State Constitution, and **before** the people by favorable vote had adopted any amendments to the Tennessee Constitution. Even at the present time none of the recited contingencies has taken place except that the voters, in the referendum election held in November 1962, approved the holding of the constitutional convention provided for by Chapter 2, Public Acts of 1962.

The judgment of the Tennessee Supreme Court was that "in these circumstances" the Bill of Complaint fails to state a cause of action under the Tennessee Declaratory Judgments Act, that said Act "deals only with present rights that have accrued under presently existing facts", that Tennessee courts have "no power to determine rights or possible controversies in anticipation of events that may not occur" and that the Tennessee Declaratory Judgments Act "does not enable courts to give advisory opinions upon what the law would be upon a theoretical or hypothetical state of facts."

The judgment of the Tennessee Supreme Court was consistent with and in accord with its prior and uniform interpretation of the Tennessee Declaratory Judgments Act, as evidenced by the numerous prior decisions of such Court cited in its Opinion in the case at bar.

To reverse the judgment hereinabove summarized, it would be necessary for this Court to decide and determine that the Tennessee Supreme Court has misconstrued and misapplied a state statute (the Tennessee Declaratory Judgments Act), the constitutionality of which is not challenged nor involved here, but under a principle so

well settled as to be axiomatic, the Supreme Court of the United States must accept the construction which the state court has put upon a state statute.

Aero Mayflower Co. v. Board of Railroad Commissioners, 332 U. S. 495, 499-500, 68 S. Ct. 167, 169-170, 92 L. Ed. 99, 105;

Albertson v. Millard, 345 U. S. 242, 244, 73 S. Ct. 600, 602, 97 L. Ed. 983, 985;

Kingsley Int. Pic. Corp. v. Regents of N. Y. U., 360 U. S. 684, 688, 79 S. Ct. 1362, 1365, 3 L. Ed. (2d) 1512, 1516;

Garner v. Louisiana, 368 U. S. 157, 166, 169, 82 S. Ct. 248, 253-254, 7 L. Ed. (2) 207, 216;

Cramp v. Board of Pub. Inst. of Orange Co., Fla., 368 U. S. 278, 285, 82 S. Ct. 275, 279-280, 7 L. Ed. (2d) 285, 291.

There is no claim in the Jurisdictional Statement and there would be no basis for such claim if made, that the non-federal ground of the state court's decision, to-wit, the proper construction of the Tennessee Declaratory Judgments Act was a mere pretext or cloak to evade decision of a federal question. On the other hand, the Opinion of the Supreme Court carefully pointed out:

> ". . . if the convention should propose, and the people of the State should ratify, an amendment which should be in conflict with the Federal Constitution and should adversely affect complainant, he would then have his remedy. Upon such showing by him, it would be the duty of the courts, state and federal, under the 'supremacy clause', to declare such amendment void to the extent of the conflict.
>
> "But such duty can arise only after such a case has been presented. Manifestly, it is now impossible to predict what the convention may do—what proposal or proposals it may make; and it is equally impossible to foretell whether, if any proposal or proposals are

> submitted, the people, by their vote, will ratify
> reject them."

In summary, it is submitted that the judgment
appeal of the Tennessee Supreme Court rests upon
adequate non-federal basis and that this Court will
decide that a state court has erroneously interpreted
own state statute and having so decided pass upon
constitutionality of another state statute (Chapter
Public Acts of 1962) involving possible future rights
contingencies.

NO SUBSTANTIAL FEDERAL QUESTION.

The second ground of appellees' motion to dismis
that there is lacking any substantial federal questio

Appellant's contention that Chapter 2, Public Acts
1962 violates the equal protection clause of the F
teenth Amendment is fairly summarized by the Ten
see Supreme Court as follows:

> "The argument for (appellant) is that Baker
> Carr (369) U. S. 186, 7 L. Ed. (2); same case,
> F. Supp. 341) held unconstitutional Tennessee's
> of 1901, which apportioned members in its House
> Representatives upon the same basis as this 1962
> apportions delegates to the constitutional convent
> that membership in the convention is as importan
> membership in the House; and that an apportionm
> which is void as to one must be void as to the othe

The difficulty with appellant's argument is that
analogy between a permanent legislative body and a si
constitutional convention is incomplete and the distinct
are both striking and important.

As the Supreme Court of Tennessee points out,
analogy overlooks the fundamental difference betwee
legislative body and a constitutional convention and ap

lant really is challenging the right of the people of Tennessee to amend their Constitution in the mode provided by it.

The Legislature in Tennessee has the final power **to make law.** The constitutional convention in Tennessee has no power to make law, nor to take any other final action. It can only propose constitutional changes for ratification or rejection by the people. It can do this only when a statewide election has by favorable vote authorized the delegates to the convention to be elected and to assemble.

An Act authorizing such constitutional convention, as well as the convention it provides for, is merely part of the machinery of the amending process. In passing such Act as Chapter 2, Public Acts of 1962, the Legislature is not exercising the legislative authority but is acting as a special agency under the Tennessee Constitution to set in motion the amendatory process which ultimately culminates in an election at which the proposed amendments are accepted or rejected.

The Tennessee Supreme Court further points out in its Opinion that the State Constitution "recognizes the fundamental difference between the power of its General Assembly to take final action—i. e., **to make law** and the narrowly limited power of a constitutional convention to propose changes for submission to a vote of the people" and it does this by making totally different provisions for the membership or composition of the two different bodies. As to the General Assembly, members are to be apportioned "upon the basis of the qualified voters." As to the constitutional convention, delegates are to be chosen **"in such mode and manner as shall be prescribed"** by the legislature.

The Tennessee Supreme Court then quoted from an earlier decision by it (**Cummings v. Beeler**, 189 Tenn. 151, 175-176, 223 S. W. 2d 913, 923, as follows:

"The power to 'alter, reform or abolish' the Tennessee Constitution resides in the people, not in the Legislature. The people are possessed with ultimate sovereignty and are the source of all state authority. The people have the ultimate power to control and alter their constitution, subject only to such limitations and restraints as may be imposed by the Constitution of the United States."

"It is **not the legislature who limit the scope of a convention but it is the people themselves who by their vote under the terms of this act limit the scope of the convention.**" (Emphasis by the Court.)

The Tennessee Supreme Court further points out that as regards Chapter 2, Public Acts of 1962, "the controlling element" is neither the legislative act nor the constitutional convention, "but the approval and ratification of the terms of the Act by the vote of the people," and the delegates to the convention derive their whole authority and commission from such vote.

Finally, the Tennessee Supreme Court emphasizes that, unlike a legislature, the constitutional convention and its delegates can take no final action. They are strictly limited to the subjects specified in the call and as to these can only make proposals which can have no effect unless and until they are ratified in another election by a vote of the people of the State at large, where every qualified voter will be entitled to vote and every vote given the same weight.

The Opinion of the Tennessee Supreme Court has pointed out so clearly and decisively the lack of substance in appellant's argument that prolonged discussion is inappropriate. Appellant has nothing to fear except that a majority of the people of Tennessee, acting in exact conformity with the procedure provided in the State Constitution, will put something in such Constitution which

appellant finds objectionable and that such provision, undesired by him, will be held constitutional and in conformity with all guarantees of the Federal Constitution. To protect against this possibility, appellant sought to deny the voters of Tennessee the right to express their desires at the polls. Having been rebuffed by the courts in an effort to secure an injunction against the election and having been rebuffed by the qualified voters of Tennessee who approved the holding of a constitutional convention, appellant continues to seek to destroy the convention before it can make proposals which appellant opposes and which the electorate **may** approve!

Appellees submit that the case at bar does not present a substantial federal question.

APPELLANT IS WITHOUT STANDING IN THIS COURT.

Appellees' motion to dismiss has for its third ground that appellant has no standing in this Court to attack the constitutionality of Chapter 2, Public Acts of Tennessee for 1962.

Whether the appellant has standing to attack the state statute in this Court is an issue to which this Court brings its independent judgment. The controlling question is, whether the appellant "has sustained or is immediately in danger of sustaining some direct injury as a result of (the statute's) enforcement . . . ." **Cramp v. Board of Pub. Inst., Orange County, Fla.**, 368 U. S. 278, 282-283.

Obviously, appellant has sustained as yet no injury by reason of said Chapter 2. Delegates to the Constitutional Convention have not been elected nor assembled. *A fortiori*, the Convention has recommended no constitutional changes and the electorate has ratified or approved no such changes.

It is equally clear that appellant is in no **immediate** danger of sustaining a **direct** injury. What changes, if any, in the Tennessee Constitution will be recommended by the Convention is speculative and uncertain. Whether any changes, if recommended by the Convention, will be adopted by the electorate in a statewide election, held under the principle of one person, one vote, is equally speculative and uncertain. Whether a change, if recommended and adopted, will adversely affect appellant cannot be judged until the nature and extent of the change is decided. In other words, under established principles, the appellant has no standing in this Court at the present time to attack the constitutionality of Chapter 2, Public Acts of Tennessee for 1962.

Respectfully submitted.

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee.

THOMAS E. FOX,
Assistant Attorney General,
State of Tennessee.

I certify that I forwarded a copy of this Motion to Dismiss and Brief in Support Thereof to Mr. Harris A. Gilbert, Attorney at Law, Nashville Bank and Trust Company, Nashville, Tennessee, on this the 16 day of January, 1964.

Thomas E. Fox,
Assistant Attorney General,
State of Tennessee.